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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
of Chicago, Illinois,
SAMUEL A. DEW,
of Kansas City, Mo.,
Counsel for Petitioner.

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No.

MANUFACTURERS' FINANCE COMPANY,
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vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Manufacturers' Finance Company, a corporation, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit to review a decree of that Court entered June 1[illegible] 1934,* affirming a decree of the United States District Court for the Northern District of Illinois, Eastern Division. A certified transcript of the record in the case, in

*Petition for rehearing denied October 1, 1934.

cluding the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

STATEMENT OF MATTERS INVOLVED.

In a general creditor's suit brought in the United States District Court for the Northern District of Illinois, Eastern Division, against the Grigsby-Grunow Company (hereinafter termed company) an Illinois corporation (R. 2), temporary receivers were appointed for all the property and the assets of the company (alleged to be worth over $28,000,000, and over $23,000,000 in excess of liabilities (R. 3)), with the usual powers of operating receivers (R. 7-9). On December 5, 1933, the receivers were continued as such, and authorized to continue and operate the business and to maintain the business and properties as a going concern (R. 19).

November 29, 1933, petitioner filed its intervening petition in the main proceeding (R. 13) setting forth that on October 5, 1933, petitioner entered into a contract in writing with the company (R. 46), providing for the purchase by petitioner from the company of such accounts receivable of the company as might be acceptable to petitioner and for the performance of certain services, for which the company agreed to pay compensation to petitioner.* Execution of the contract by the company was approved by its Board of Directors (R. 66).

---

*The contract provided for the sale of accounts receivable to petitioner by the company, for which petitioner agreed to pay the company 100 per cent of the actual net amounts thereof, of which 50 per cent was to be paid upon acceptance of such accounts by petitioner and the remaining 50 per cent, less any deductions and plus any overpayments by debtors, and less the compensation, was to be paid to the company immediately upon payment of the accounts to petitioner, with the proviso that such remainder need not be paid by petitioner so long as any account purchased by petitioner from the company shall be in any manner affected by any breach or violation of any warranty of the company (R. 47).

Petitioner further alleged that pursuant to the terms of said contract it purchased from the company accounts receivable aggregating approximately $1,500,000 (R. 33, 34) and had advanced about $750,000 thereon (R. 31-33), that when the receivers were appointed petitioner held accounts amounting to approximately $551,000 and had paid the company therefor approximately $265,000; that it fully complied with its part of said contract (R. 13), which was not denied, and petitioner prayed that the Court direct the receivers to deliver to petitioner all moneys collected by them, on the accounts assigned to petitioner, until such time as petitioner shall have received the amount due it, together with reasonable attorney's fees, costs and expenses (R. 16).

This intervening petition was necessitated by the refusal of the receivers to pay over any moneys collected on accounts purchased by petitioner, until directed to do so by the Court (R. 43, Par. 13), and the entry of an order, *without notice* to petitioner, to turn over and deliver, *on*

The company warranted there would be no appointment of receivers for the company (R. 48, 49).

The company was given the right to collect such accounts; such right to terminate in the event, among others, of a business failure of the company. Proceeds of collections were to be transmitted to petitioner in kind, each day as received. If incurred, the company was to pay petitioner's attorney's fees, costs and expenses (R. 49). The rate of compensation was 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by, until paid to, petitioner (R. 48-62). This compensation was at the rate of 20 per cent per annum (R. 63).

The services to be performed by petitioner consisted of: (1) to furnish by mail to the company credit information in hand about the customers of the company, upon request of the company. (2) Have auditors give to the company the report of such examination therein provided for, with full information and advice as to the most desirable method of keeping the books, records and accounts of the company. (3) Pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase, and upon request give financial and business advice. (4) Accept at par, less exchange, subject to payment, all remittances received through the company. (5) Obtain and have on hand at all times, sufficient funds to make prompt remittance to the company for all acceptable accounts within the limits agreed upon. (6) Supply all forms needed for assignment of accounts. (7) Place petitioner's credit department and collection department at the disposal of the company and permit the company to submit any of its sales contracts with its customers to the general counsel of petitioner for advice and opinion as to form and legality thereof.

the same basis as prior to filing of the bill of complaint to petitioner funds collected by the receivers on assigned accounts (R. 63).

The receivers filed their answer (R. 17) admitting the allegations of the petition, but stated that they had expended time and money in dealing with debtors, which redounded to the benefit of petitioner; that the contract involved merely a loan to the company and that they can see no justification for equitable charge against them upon balances owing as of the date of the receivership *of an interest rate thereupon in excess of the legal maximum rate permitted by the laws of the State of Illinois;* that in the practice between the company and petitioner prior to receivership one-half only of accounts collected was paid to petitioner, the accounts remaining substantially twice in face amount of net remaining advances;* that all collections upon such accounts made since the appointment of the receivers were placed in a special bank account (R. 18, 19).

The receivers on the trial filed an amended answer (R. 21) alleging that all of the principal amount of the advances and interest at the contract rate to date of appointment of the receivers was paid to petitioner, that the receivers could see no justification for equitable charge against them upon balances owing as of the date of the receivership *of an interest rate thereupon in excess of 7 per cent per annum,* and denied that in equity petitioner is entitled to recover its attorney's fees.

During the period from December 14, 1933, to December 29, 1933, on orders entered by the court (R. 64, 65), the

*This was erroneous. The stipulated facts are that when the company received payment from its customers it transmitted each payment in its original form to petitioner. Petitioner would endorse and deposit the remittance thus received and remit to the company the balance of the face value of the accounts not already advanced, that is, 50 per cent less any deductions and plus any overpayments by the respective debtors (R. 43, Par. 10).

receivers paid petitioner $269,700.78 (R. 44, 45, Par. 16-19) which constituted all advances by petitioner to the company, together with compensation at the contract rate to the date the receivers were appointed (R. 45, Par. 20).

The suit proceeded for compensation at the contract rate from November 24, 1933, to December 29, 1933, amounting to $4,394.48 (R. 45) constituting an average claim of 28.3 per cent interest upon average net balances outstanding (R. 65), the rate of return to petitioner being variable under the terms of the contract for the reason that the compensation is calculated upon the net face amount of accounts rather than on money advanced (R. 65, Par. H). Petitioner also claimed reasonable attorneys' fees (R. 29).

The District Court allowed petitioner interest from November 24, 1933, upon outstanding balances of advances made prior to said date by petitioner, at the rate of 7 per cent per annum and denied further relief (R. 76), on the ground that paying 28.3 per cent interest per annum is unconscionable, adhering strictly to the decision of the Circuit Court of Appeals for the Seventh Circuit In re: *Chicago Reed & Furniture Co.*, 7 Fed. (2nd) 885. The Circuit Court of Appeals affirmed the decree (R. 98).

After the appeal was perfected and briefs filed, on motion and stipulation, an order was entered by the Circuit Court of Appeals substituting Frank M. McKey, as Trustee in Bankruptcy of the company, in lieu of said equity receivers (R. 92).

Reasons for Granting the Writ.

1. The decision of the court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In re: *International*

Raw Material Corporation, 22 Fed. (2nd) 920, and the Eighth Circuit in the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2nd) 940,* on the same matters.

2. The court below has decided an important question of local law in conflict with the decision of the Supreme Court of Illinois in *Tennant* v. *Joerns*, 329 Ill. 34 and *Poe* v. *Ulrey*, 233 Ill. 56, the decisions of the Appellate Court of Illinois, and the Statutes of Illinois.

3. The court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this court; that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit affirming the decree of the District Court be reversed and remanded, and that the petitioner be granted such other and further relief as may seem proper.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

*Certiorari denied October 8, 1934.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court has not been officially reported, but is printed in full in the record (R. 70).

The opinion of the Circuit Court of Appeals is reported in 72 Fed. (2nd) 471 (R. 93).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347A). The date of the decree of the Circuit Court of Appeals for the Seventh Circuit (R. 93-97) sought to be reviewed was June 19, 1934. The date of the order of said Circuit Court of Appeals denying the petition for rehearing was October 1, 1934 (R. 117).

III.

Statement of the Case.

The facts have been fully set forth under the caption "Statement of Matters Involved" which is hereby adopted.

IV.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In not allowing compensation at the rate provided for in the contract, subsequent to November 24, 1933, and until petitioner had been paid in full its advances.

2. In not allowing petitioner a reasonable amount for attorney's fees incurred in the prosecution of its intervening petition, as prayed for in said intervening petition.

3. In affirming the decree of the District Court.

4. In not overruling *In re*: Chicago Reed & Furniture Company, 7 Fed. (2nd) 885 (7th Circuit).

SUMMARY OF ARGUMENT.

I.

Adhering to its former decision in *In re*: Chicago Reed & Furniture Co., 7 Fed. (2nd) 885, the court decided that petitioner could not enforce a contract under which an Illinois corporation agrees to pay interest in excess of 7 per cent per annum. The decision in the *Reed* case was criticized in *In re*: International Raw Material Co., 22 Fed. (2nd) 920 (2nd Circuit) and not followed in *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940 (8th Circuit).

II.

The policy of the Illinois law as reflected by legislative enactments and decisions of the Supreme Court, permit corporations to pay any rate of interest that they may determine. The construction placed upon such statutes by state courts of Illinois are binding on Federal courts located in Illinois.

III.

Without any proof or claim of fraud or mistake, the court holds that it is not obliged to enforce a contract under which an Illinois corporation agrees to pay 28.3 per cent as interest, solely on the ground that such contract is harsh and oppressive and shocks the conscience.

ARGUMENT.

I.

The decision of the Court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In re: International Raw Material Corporation, 22 Fed. (2nd) 920, and the Eighth Circuit in the case of Merchants & Manufacturers Securities Company v. Johnson, 69 Fed. (2nd) 940, on the same matters.

As appears from the statement of facts, the vital question presented to the District Court and to the Circuit Court of Appeals was whether an Illinois corporation may stipulate or agree upon any rate of compensation or interest and take and pay the same, and whether such contract is binding upon receivers for the corporation appointed by a court of equity.

By the statutes of Illinois in effect during the time of all the transactions here involved it was provided that a corporation may "borrow money at such rates of interest as the corporation may determine, without regard to the restrictions of any usury law of the state." (Cahill Illinois Rev. Statutes, 1933 Ed. Ch. 32, Sec. 5 (h) page 725). This statute is almost identical with the enactment of 1919. From 1919 to 1925 there were no decisions either in the State courts of Illinois or in the Federal courts located in Illinois construing the above statute. In 1925 the Circuit Court of Appeals for the Seventh Circuit decided In re: *Chicago Reed & Furniture Company,* 7 Fed. (2nd) 885. That case involved a loan of $1,700 on chattel mortgage security. Notes aggregating $2,000 payable in twelve

monthly installments, and bearing interest at 7 per cent were given. The borrower was adjudicated bankrupt and on a petition filed by the holder of the security, relief was granted, except as to the item of $300 claimed to be a commission. The Court said:

> "It is conceded that the $300 must be regarded as compensation to petitioner for the use of the money, and that but for paragraph 7 of section 6 of the General Corporation Act of Illinois, approved June 28, 1919 (Laws, 1919, p. 318), the Illinois usury laws would have prevented recovery of the amount in question. Petitioner maintains, and respondent denies, that the paragraph referred to permits Illinois corporations to make valid loans at any rate of interest for which they see fit to contract. The paragraph mentioned provides that corporations shall have power 'to borrow money at such rate of interest as the corporation may determine, without regard to, or restrictions under any usury law of this state, and to mortgage or pledge its property, both real and personal to secure the payment thereof.'
>
> To what extent, if at all, this has enabled corporations lawfully to bind themselves to pay interest on loans at rates beyond the theretofore statutory maximum has not to our knowledge been decided by the Illinois courts. But in our view of the case this question is not of necessity here involved. The later statute may or may not have repealed *pro tanto* the usury law of the state, but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience. 39 Cyc. 891."

Since July 1, 1925, the Interest Acts of Illinois have provided:

> "With respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same." (Cahill's Illinois Revised Statutes, 1933 Ed. Ch. 74, Sec. 4, p. 1701.)

On February 24, 1928, in *Tennant* v. *Joerns,* 329 Ill. 34, the Supreme Court sustained the constitutionality of the 1919 Act, permitting corporations to borrow money at such rates of interest as they may determine, and in effect held that said statute withdrew from the operation of the Interest Act loans to corporations which would otherwise be unlawful.

Subsequently, the Appellate Court of Illinois, in *Simon* v. *South End Cleaners & Dyers,* 246 Ill. App. 14, and *Polish Peoples Home Association* v. *Atlas,* 246 Ill. App. 457, held that by reason of the statute corporations could not defend on the ground of usury.

On March 5, 1934, the Circuit Court of Appeals for the Eighth Circuit rendered its decision in *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940.* In that case identical contracts were before the court. A high rate of interest was involved. The receiver defended mainly on the grounds of usury and that the contracts were harsh, inequitable and unconscionable. The securities company contended that the contracts were to be construed according to the laws of Illinois, where usury was no defense. The receiver argued to the contrary and relied on the *Reed* case as the authority in the Seventh Circuit. Ignoring that decision, the court held that the contracts, construed by the laws of Illinois were not usurious and that the receiver succeeded to the property subject to the same contract rights as obtained at the time of his appointment.

The *Reed* case was severely criticised by the Circuit Court of Appeals for the Second Circuit in *In re: International Raw Material Corporation,* 22 Fed. (2nd) 920 (1927) where the court says, page 923:

> "(1) Can an agreement by a corporation to pay a rate of interest or commission in excess of the legal rate be held invalid by a court of bankruptcy, having

*Certiorari denied October 8, 1934.

the custody of a fund which is collateral security for the performance of the agreement, upon the ground that a lien upon that fund for an excessive rate is unconscionable and should not be sanctioned by a court of equity? * * *

The contention that an agreement by the bankrupt corporation to pay more than 6 per cent, be it called commissions or interest, was illegal, and should not be enforced against the collateral, is largely based upon the recent decision of the Circuit Court of Appeals of the Eighth (should be Seventh) Circuit in the case of *In re*: Chicago Reed & Furniture Co., *supra*. The court there held that, irrespective of the usury law of Illinois, a court of bankruptcy would not enforce an agreement which in that case involved payment from the proceeds of mortgaged property of an amount due for commissions and interest calculated at a rate of over 40 per cent per annum. Here there seems to be no doubt that the parties agreed among themselves to pay 6 per cent as interest on the loan and the additional sum of 1½ per cent per month as a so-called commission. We know of nothing to prevent such an agreement. The New York statute provides that no corporation shall interpose the defense of usury, and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Neither the corporations, nor those who may succeed to their rights, nor their sureties, are heard to object to their bargain, either at law or in equity, because of usury. *Curtis* v. *Leavitt,* 15 N. Y. 9; *Stewart* v. *Bramhall,* 74 N. Y. 85; *Gamble* v. *Queens County Water Co.,* 123 N. Y. 108, 25 N. E. 201, 9 L. R. A. 527; *Hubbard* v. *Tod,* 171 U. S. 474, 19 S. Ct. 14, 43 L. Ed. 246; *The Vigilancia* (C. C. A. 2d Cir.), 73 F. 452.

In *Boise* v. *Talcott,* 264 Fed. 61, this court allowed interest charges of 6 per cent, plus commissions of 10 per cent for acting as selling agents, together with a discount of 10 per cent on each loan to the bankrupt. There seems no justification in nullifying the agreement of the parties here, because the interest and

commissions which they deliberately arranged were too large to satisfy the ideas of a court. Here, as in other similar cases, the competition of the market fixes rates. The statute has not attempted to control usury contracts made by corporations. Any decision by a court as to what would be a reasonable rate would either have to vary with the kind of security furnished or else be a mere doctrinaire pronouncement. Corporate contracts to pay more than the statutory rate of interest have been, and we believe should be, left to the agreement of the parties, and not disturbed, in the absence of fraud or duress."

The Court of Appeals in this case recognizes the force and logic of the argument advanced by the Second Circuit in the *International Raw Material* case, but refuse to follow it. The Court says:

"We concede that the International Raw Material Corporation case is quite similar in many respects to the case at bar. They do differ in the amount of attorney's fees claimed and in the fact that in the instant case the finance company is attempting to charge the receivers a rate considerably higher than the rate in fact used between the contracting parties, which was the minimum rate reserved by the contract. * * *

We can see no reason under the circumstances of this case for overruling the principle laid down in the Chicago Reed & Furniture Company case, *supra*, in favor of that enunciated in the International Raw Material Corporation case, *supra*." (R. 97.)

On the point that Illinois corporations cannot defend on the ground of usury in view of the statutes and may recover interest and attorney's fees in accordance with the terms of the contract, the Court of Appeals admit that the weight of authority is with the petitioner when it says:

"It (petitioner) finds substantial support for this argument in certain cases cited by it, (*Estes* v. *E. B. Estes & Sons*, 24 F. (2d) 756; *Lutz & Schramm, Inc.*,

38 A. B. R. 351; *In re*: *International Raw Material Co.*, 22 F. (2d) 920; *In re*: *Gotham Can Co.*, 48 F. (2d) 540; *Ramsey* v. *Marlin Firearms Co.*, 14 F. (2d) 314; See also *In re*: *Bernard & Katz*, 38 F. (2d) 40, not cited by appellant), the strongest of which for its purposes is *In re*: *International Raw Material Corporation*, 22 F. (2d) 920, decided by the Court of Appeals for the Second Circuit." (R. 96.)

A serious conflict exists between the Seventh Circuit and the Second and Eighth Circuits on the same matters, which should be corrected by this Honorable Court.

II.

The Court below has decided an important question of local law in conflict with the decisions of the Supreme Court of Illinois in Tennant v. Joerns, 329 Ill. 34, and Poe v. Ulray, 233 Ill. 56, the decisions of the Appellate Courts of Illinois and the Statutes of Illinois.

(A) The Statutes as construed by the Supreme Court of Illinois are binding on a Federal Equity Court sitting in Illinois.

The policy of the Illinois law was established by the legislature when it adopted statutes permitting corporations to pay any rate of interest and when the reviewing courts of Illinois sustained these statutes and enforced contracts by corporations to pay substantial rates of interest.

In *Tennant* v. *Joerns*, 329 Ill. 34, it was urged that the Act authorizing corporations to borrow money at any rate of interest is usurious, immoral in principle and contrary to public policy. With respect to that phase of the matter, the court said, page 40:

"What constitutes usury is determined by the legislature and varies in different States. It has varied

at different times in this State. This court held in *People* v. *Wheeler,* 259 Ill. 99, that usury of itself is not immoral. 'It would be contrary to common experience to say that a man who lends money at usurious rates is for that reason, alone, not a man of good moral character.' Usury is not a crime in itself, and its defense to a suit depends upon the expressed statutes. It is not founded on a common law right and is clearly within the power of the legislature to take it away. (*Rosa* v. *Butterfield,* 33 N. Y. 665; *Southern Life Ins. and Trust Co.* v. *Packer & Prentice,* 17 *id.* 51; *Town of Danville* v. *Pace,* 25 Gratt. i, 18 Am. Rep. 663.)"

The central point of the decision of the Court of Appeals in this case and in the *Reed* case is that courts of equity will not lend their aid to enforce a contract which, by reason of a high rate of interest, is harsh, oppressive and shocks the conscience. The court will note from the pleadings and proof that there was no charge or intimation by the receivers of fraud, deceit or overreaching, and the record discloses that this contract was entered into between two large corporations dealing through their respective boards of directors at arm's length. It is the policy of the Illinois law to uphold such contracts in the absence of fraud. In *Poe* v. *Ulrey,* 233 Ill. 56, the court says:

"So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the

courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law."

(A) The statutes as construed by the Supreme Court of Illinois are binding on a Federal Equity Court sitting in Illinois.

This court has repeatedly held that the statutes of a state are binding upon Federal courts sitting within the state, provided such statutes do not enlarge or diminish Federal equity jurisdiction. In *M. K. & T. Trust Company* v. *Krumseig,* 172 U. S. 351, this court considered the question of whether the statutes of a state defining the rights of the parties under a contract for a high rate of interest was binding on Federal equity courts. The holding is that all questions of the rights of the parties under such contracts depend upon the laws of the state where the transaction took place and that Federal courts are bound by statutes and decisions of the courts of such state on that subject, even though such statute and decisions appear contrary to fundamental principles of equity, and said, at page 355:

> "Usury is, of course, merely a statutory offense, and Federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts. *DeWolf* v. *Johnson,* 10 Wheat. 367; *Scudder* v. *Union National Bank,* 91 U. S. 406."

And again, page 359, says:

> "If the state, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether

> acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In *Michigan* v. *Michigan Trust Company,* 286 U. S. 334, in an equity proceeding, this court said, page 342:

> "Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to the courts of the state, if they have spoken, pronounce the final word."

In *Mason* v. *United States,* 260 U. S. 545, this court said, at page 557, *et seq.*:

> "Subject to certain exceptions the statutes of a State are binding upon the Federal courts sitting within the State as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. * * * But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. * * * It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the Federal courts cannot be limited or restrained by a state. * * * But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

The conclusion is irresistible that the District Court and the court below were bound by the statutes and decisions of the Illinois courts which they refused to follow in favor of inapplicable rules in equity.

III.

The court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

The opinion of the court below assumes that there is some equitable or moral standard by which rates of compensation or interest may be measured in a Federal court of equity, without reference to the statutes of the individual state, and that a court of equity may properly decline to enforce a contract, free from fraud, for an agreed rate, merely because such rate is too high in the opinion of the court, and disregard the statutes of the State where the transaction took place, which expressly permits *any* rate upon which the parties may agree.

In the *Reed* case, the court cites 39 Cyc. 891 as authority for its conclusion that equity will not enforce a contract where the rate of interest to be paid by a corporation which cannot legally defend on the ground of usury is so harsh and oppressive as to shock the conscience. That section is now found in 66 C. J. 143 under the title *"Oppressive Contracts as Distinguished From Usurious Contracts."* There are several cases cited under this heading, but none of them grant relief to a corporation. One of the cases cited, *Hagaman* v. *Reinach,* 96 N. Y. S. 719 (1905) quotes the opinion of this court in *Lloyd* v. *Scott,* 7 L. Ed. 833:

> "The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act because it is prohibited by law."

To sustain the view of the court below, it necessarily had to ignore the contract, freely and voluntarily entered into between the parties. There is nothing in the Illinois

law fixing 7 per cent interest as either a minimum or a maximum rate to be paid by a corporation, and that, we submit, is a material change of the terms of the contract not contemplated by either of the parties.

In *Pacific State Savings Loan & Bldg. Co.* v. *Green,* 123 Fed. 43 (9th Cir.), the court says:

> "The general rule is, we think, well settled that a court of equity is not authorized to set aside and annul a contract made by parties with full knowledge of all the terms and conditions of the same, without it is clearly and satisfactorily shown that there was fraud, oppression, or undue advantage taken with reference to its execution." (Citing cases.)

To the same effect see *Gunby* v. *Armstrong,* 133 Fed. 417 (5th Cir.), and cases cited therein, at page 432.

The question of whether or not this contract was unconscionable is inseparably connected with the substantive law and public policy of the State of Illinois. Usury has never been considered *malum in se,* but merely *malum prohibitum.* As was said in the case of *People* v. *Wheeler,* 259 Ill. 99, at page 101:

> "Usury is not an offense against the law of Illinois. Of itself it is not immoral."

The legislature of Illinois has given a substantive right to corporations to pay and receive any rate of interest they see fit, and no court should abrogate this right merely because a particular contract may seem to be improvidently made. The public policy of Illinois as reflected by its legislative enactments makes all such contracts legal, valid and enforceable and the question of whether or not the interest charge is 20 per cent or 28 per cent is immaterial.

We submit that the decision of the Court of Appeals is without foundation in law or in logic. Petitioner was not asking for equitable relief but was merely asserting its

legal rights. It was not in a court of equity by choice but was forced into said proceeding by reason of the appointment of receivers, who were collecting and retaining petitioner's money, and by reason of the injunction entered by the trial court restraining all persons from interfering with the receivers and the estate (R. 9).

This Court, in *M. K. & T. Trust Company* v. *Krumseig*, 172 U. S. 351, at page 358, says:

> "But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.
>
> "We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State."

We pointed out in the petition for rehearing (R. 101) that contracts of the type here involved were held valid, binding and enforceable not only as to the corporation but receivers for such corporation as well. The decision of the court below is in direct conflict with the decisions of District and Circuit Courts in every other circuit that has ruled on the matter. The contrary decisions appear as follows.*

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*Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756 (Mass. Dist. Ct.); International Raw Material Co., 22 Fed. (2nd) 920 (2nd Cir.); Ramsey v. Marlin Firearms Co., 14 Fed. (2nd) 314 (Conn. Dist. Ct.); In re: Rosenblatt, 299 Fed. 771 (Dist. Ct. of New York); Boise v. Talcott, 264 Fed. 61

Petitioner sought to recover reasonable attorney's fees pursuant to the terms of the contract. When the petition was filed there was an indebtedness owing on the contract in excess of $250,000. The receivers were making collections and refused to turn over such collections to the petitioner until directed to do so by the court (R. 43, Par. 13), thereby making it imperative for petitioner to engage counsel. The receivers, immediately upon being appointed, procured an order of the trial court *without notice to petitioner* authorizing the receivers to turn over to the petitioner funds collected by the receivers on assigned accounts *on the same basis as prior to filing of the bill of complaint,* which order was construed by petitioner to mean that it would be required to return to the receivers one-half of the collections received on assigned accounts. Petitioner contended, and rightfully so, that it could retain all of the collections until payment in full of its indebtedness was made. The contract authorizes this action in the event that the company or any of the accounts are in default (R. 47), and the appointment of the receivers constituted a default under such contract (R. 48, Par. 5, Sec. 2). Aside from the strict construction of the contract, the record discloses that the accounts petitioner held were merely claims against dealers and distributors of the company for merchandise sold. At the time the intervening petition was filed it was very doubtful whether the full amount owing to petitioner would be paid. The receivers were evidently in doubt about this matter, because the court entered an order on their petition (R. 61) authorizing the expenditure of $35,000 for "further adver-

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(C. C. A. 2nd); In re: Gotham Can Co., 48 Fed. (2nd) 540 (C. C. A. 2nd); In the matter of Lutz & Schramm Co., Inc., 38 A. B. R. 351 (Dist. Ct. Pa.); Brierly v. Commercial Credit Co., 43 Fed. (2nd) 730 (C. C. A. 3rd); Chapman v. Emerson, 8 Fed. (2nd) 353 (C. C. A. 4th); United Divers v. Commercial Credit Co., 289 Fed. 316 (C. C. A. 5th); LeSueur v. Manufacturers Finance Co., 285 Fed. 490 (C. C. A. 6th); Merchants & Manufacturers Securities Co. v. Johnson, 69 Fed. (2nd) 940 (C. C. A. 8th); Pacific State Savings Loan & Bldg. Co. v. Green, 123 Fed. 43 (C. C. A. 9th).

tising" for the month of December, 1933, and such $35,000 was paid to the distributors in the form of credits on their accounts for the purpose of inducing the distributors to "continue in the fold of Grigsby-Grunow" (R. 25). The chief auditor for the receivers testified:

> "There was a price concession on one particular line of a substantial amount. In fact, in my opinion, there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them." (R. 24.)

With this uncertainty present, petitioner was unwilling to return to the receivers 50 per cent of moneys collected on such accounts receivable and if they were required to obey and follow the order (R. 63) their position might have been seriously endangered. Obviously, in these circumstances, it became necessary for petitioner to engage counsel to protect its interests.

On behalf of petitioner, one witness testified that in his opinion a reasonable attorney's fee would be $7,800 (R. 29) and no evidence was offered to the contrary. Petitioner throughout has requested a reasonable fee and never insisted upon the allowance of $7,800. Notwithstanding such testimony, the trial court in its findings of fact and conclusions of law (R. 75) finds that:

> "No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner for services necessarily rendered herein."

In its opinion, the trial court said:

> "Perhaps the court should say further concerning the claim for attorney's fees, that the court cannot see any reason for intervening petitioner having obligated itself for attorney's fees in any considerable amount." (R. 72.)

And in the decree, interest is allowed at the rate of 7 per cent per annum and all further relief prayed for in the intervening petition was denied (R. 76).

The court below draws its own conclusion that the attorney's fees amounted to 177 per cent of the maximum amount claimed against the receiver (R. 97) which we submit is wholly incorrect. In numerous cases under similar contracts, courts have allowed attorney's fees, in equity and bankruptcy cases.*

In *Boise* v. *Talcott,* 264 Fed. 61, the court says:

> "The items allowed in payment of attorneys' fees and disbursements are fully covered by the contract which provides for payment of 'all legal expenses and reasonable counsel fees.' "

In the case of *In re: International Raw Material Company,* 22 Fed (2nd) 920, the Circuit Court of Appeals for the Second Circuit approves the payment of attorney's fees under a provision in a contract which says:

> "The bankers may employ counsel to advise them and charge the account of the client with attorney's fees actually incurred or reasonable prospective attorney's fees and the amount thereof shall be added to the lien of the bankers and be secured by collateral."

In the matter of *Lutz & Schramm Company, Inc.,* 38 Am. Bankruptcy Reports, 351, the court says:

> "As the contract provides for attorney's fees and the amount charged is not claimed to be out of proportion to the services rendered, I am also of opinion that this claim should be allowed."

In the very latest expression on the subject, *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd)

*In re: International Raw Material Company, 22 Fed. (2nd) 920; Boise v. Talcott, 264 Fed. 61; Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756; Matter of Lutz & Schramm Company, Inc., 38 A. B. R. 351; In re: Gotham Can Company, 48 Fed. (2nd) 540; In re: Rosenblatt, 299 Fed. 771.

940 (8th Circuit), the amount sought to be recovered by the finance company was $32,489.01, and the trial court denied attorney's fees. On appeal, the Circuit Court reversed that decree and said, page 945:

> "There is no finding by the lower court fixing the amount of such attorney's fees, although there is evidence in the record as to the value of the legal services rendered. We have held that the judge of the trial or appellate court is an expert himself and knows as well as a legal expert what are reasonable attorney's fees. * * * The question was not put in issue by any testimony produced by appellee (receiver) presumably on the theory that no amount should in any event be allowed, or on the theory that the court could determine the reasonableness of the attorney's fees from the record. * * * We therefore fix the fees to be recovered by appellant at $3,000.00."

CONCLUSION.

The Circuit Court of Appeals, when it decided the *Chicago Reed & Furniture Company* case, 7 Fed. (2nd) 885, seriously erred and when it decided the instant case and adhered to its former decision, it disregarded the weight of authority to the contrary. Hence, a very unsatisfactory precedent has been established in the Seventh Circuit. The uncertainty existing by reason of the instant opinion can be settled by this court's ruling. The ruling that courts of equity need not enforce a contract where the rate of interest, otherwise lawful, is higher than the court thinks should be allowed, is an important matter of general law which we believe has been improperly declared and should not be permitted to stand. For which reasons petitioner submits that the writ of certiorari should be granted.

Respectfully submitted,

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